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DHANALETCHMY SUBRAMANIAM v. RAJANDRAN SUBRAMANIAM & ORS

HIGH COURT MALAYA, SHAH ALAM
ALICE LOKE YEE CHING J
[SUIT NO: BA-22NCVC-541-11-2019]
3 MARCH 2023

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Abstract – *(i) A purchaser of a land cannot be said to be a bona fide purchaser for value with an indefeasible title when the purchase of the land is well below the market value. The test of valuable consideration is simply not satisfied; (ii) In a situation where a land is obtained through fraudulent means, for a claim in negligence to succeed against a chargee bank, the claimant must establish that a duty of care is owed by the bank to the claimant. A duty of care does not arise where there is no relationship of proximity between the claimant and the bank. When a bank is a bona fide chargee of a land, it becomes the holder of subsequent interest in the land and is afforded the protection under s. 340(3) of the National Land Code.*

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LAND LAW: *Title – Indefeasibility of title – Deceased died leaving land and two children/beneficiaries – One beneficiary, stating to be only surviving beneficiary, petitioned for distribution order citing land as forming part of deceased's estate – Registered as proprietor of land – Whether distribution order fraudulently obtained in disregard of other beneficiary's rights – Whether null and void and of no effect – Whether title indefeasible*

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LAND LAW: *Sale of land – Bona fide purchaser – Deceased died leaving land and two children/beneficiaries – One beneficiary, stating to be only surviving beneficiary, petitioned for distribution order citing land as forming part of deceased's estate – Registered as proprietor of land – Land sold to purchaser – Whether purchaser bona fide purchaser – Whether held indefeasible title – Whether could benefit from protection in proviso to s. 340(3) of National Land Code*

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TORT: *Negligence – Land matter – Bank – Deceased died leaving land and two children/beneficiaries – One beneficiary, stating to be only surviving beneficiary, petitioned for distribution order citing land as forming part of deceased's estate – Registered as proprietor of land – Beneficiary sold land to purchaser – Purchaser sought financing facilities from bank to finance purchase – Land charged to bank – Whether bank negligent in approving and disbursing loan to purchaser – Whether bank holder of subsequent interest in land and could avail itself of protection afforded by proviso to s. 340(3) of National Land Code*

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The plaintiff and the first defendant were siblings and were the children of one Subramaniam Pavadai ('deceased'). The deceased died leaving behind, *inter alia*, a piece of land which was a paddy field. The first defendant, stating

himself as the only surviving beneficiary and making no mention of the plaintiff, had petitioned for a distribution order, pursuant to s. 8 of the Small Estates (Distribution) Act 1955 ('Act'), citing the land, *inter alia*, as forming part of the estate of the deceased. The proceedings in respect of the distribution of the estate were conducted before an officer ('third defendant') of the Jabatan Ketua Pengarah Tanah dan Galian (Persekutuan) Negeri Selangor ('fourth defendant') and were witnessed by the sixth and seventh defendants. At the conclusion of the proceedings, the third defendant made an order distributing immovable properties, including the land, to the first defendant. Subsequently, the first defendant caused his name to be registered as the proprietor of the land, in accordance with the distribution order. Years later, the first defendant decided to sell the land to the second defendant at the purchase price of RM300,000. To finance the purchase, the second defendant sought financing facilities from the fifth defendant. As security for the financing, the land was charged to the fifth defendant. The plaintiff came to know of the sale and transfer of the land after the transaction was concluded. This prompted the plaintiff to commence the present action against, *inter alia*, (i) the first defendant for obtaining the distribution order in disregard of her entitlement as a beneficiary; (ii) the second defendant as his purchase of the land lacked *bona fide* since the latter knew of the plaintiff's existence; and (iii) the fifth defendant in approving and disbursing the loan to the second defendant without due compliance with the conditions stipulated in the financing agreement. The plaintiff further sought consequential orders that the land, *inter alia*, be returned to the estate of the deceased and for the third and fourth defendants to rehear the petition for a distribution order. Before the trial commenced, the plaintiff withdrew the suit against the sixth and seventh defendants and the suit against them was accordingly struck out.

Held (allowing claim in part):

(1) Documentary evidence showed that the plaintiff was indisputably a beneficiary to the estate of the deceased. The plaintiff was not present at the proceedings before the third defendant as she was not informed and had no knowledge of such proceedings. As the distribution order was fraudulently obtained in disregard of the plaintiff's rights, it must be held to be null and void and of no effect. Subsequent to the issuance of the distribution order, the first defendant obtained registration of the land in his name. As the first defendant was a party to the fraud, his title was defeasible on account of the fraud. (paras 24, 26, 27 & 31)

(2) The second defendant contended that notwithstanding the defeasibility of the first defendant's title, as a *bona fide* purchase for value, he had obtained an indefeasible title. The purchase of the land was well below market value; in fact, the second defendant bought the land at a price which was half of its market value. Therefore, the test of valuable consideration was not satisfied. The amount paid for the land raised the

inference of lack of good faith. Further, the second defendant admitted to having known the first defendant for a long time. A prudent purchaser would have been put to the necessary inquiries upon knowing the presence of the plaintiff on the land, more so as the plaintiff worked on the land. It was inexplicable that the second defendant merely relied on the particulars in the copy of the title shown to him by the first defendant. The second defendant failed to take the necessary precautions and the carelessness on his part negated the good faith he claimed to have. Therefore, the second defendant could not benefit from the protection in the proviso to s. 340(3) of the National Land Code ('NLC'). His title was defeasible notwithstanding the fact that he was the registered proprietor of the land. (paras 32, 45-47, 50 & 52)

(3) There was nothing irregular in the loan approval. There was no nexus between the loan approval and the plaintiff being deprived of the land as a beneficiary. For a claim in negligence to succeed, the plaintiff must first establish that a duty of care was owed by the fifth defendant to the plaintiff. There was no relationship of proximity between the plaintiff and the fifth defendant for a duty of care to arise. In the circumstances, the plaintiff's case of negligence against the fifth defendant failed. Since the fifth defendant was the chargee, it was the holder of a subsequent interest in the land. There was nothing to suggest lack of good faith on its part. Therefore, the fifth defendant could avail itself of the protection afforded by the proviso to s. 340(3) of the NLC. The claim against the fifth defendant failed. (paras 55, 57 & 79)

(4) The claim of the plaintiff succeeded against the first and second defendants, limited to certain prayers. The claim against the third defendant succeeded to the extent that she was allowed the necessary order which were consequential to the plaintiff succeeding in the substantive claim against the first and second defendants. The second defendant was directed to redeem the amount outstanding, to be notified by the fifth defendant, for which the land was charged, failing which the plaintiff shall be allowed the redeem and such sum, if paid by the plaintiff, shall be deemed a judgment sum entered and enforceable against the second defendant. (paras 68 & 79)

Case(s) referred to:

CIMB Bank Bhd v. AmBank (M) Bhd & Ors [2017] 9 CLJ 145 FC ***(refd)***

He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal [2020] 7 CLJ 271 FC ***(refd)***

Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal [2012] 2 CLJ 165 CA ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener) [2014] 3 CLJ 869 HC ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***

See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal [2021] 6 CLJ 650 FC ***(refd)***

Sia Hiong Tee & Ors v. Chong Su Kong & Ors [2015] 8 CLJ 1173 FC ***(refd)***
Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd [2015] 7 CLJ 584 FC ***(refd)***
Tan Ying Hong v. Tan Sian San & Ors [2010] 2 CLJ 269 FC ***(refd)***
Teoh Kim Heng v. Tan Ong Ban [2014] 8 CLJ 316 CA ***(refd)***
Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal [2013] 9 CLJ 577 CA ***(refd)***

Legislation referred to:
National Land Code, s. 340(2)(a), (3)
Small Estates (Distribution) Act 1955, ss. 8, 9

For the plaintiff - Mohaji Selamat & Nurul Aqilla Salleh; M/s Mohaji, Hazury & Ismail
For the 2nd defendant - Daljeet Singh Sachdev & Sellemar; M/s Daljeet S Sachdev & Co
For the 3rd & 4th defendants - Natrah Mazman; State Legal Advisors, Selangor
For the 5th defendant - Zulaikha Aini Mohamed Khair; M/s Salehuddin Saidin & Assocs

Reported by Najib Tamby

JUDGMENT

Alice Loke Yee Ching J:

Introduction

[1] The plaintiff's suit against several defendants in this action has its genesis in the distribution order made by the Land Administrator wherein she was precluded as a beneficiary to the estate of her late father.

Salient Facts

[2] The undisputed facts are as hereinafter stated. The plaintiff and the first defendant are siblings. They are the only two children of one Subramaniam a/l Pavadai ("deceased"), who passed away on 12 June 2001. The deceased left behind two pieces of property. One was a terrace house with an address at 11, Jalan 18/16B Seksyen 18 Shah Alam ("terrace house"), and the other was a piece of land identified as HSM 13095 Lot 6095, Mukim Tanjung Karang, Kuala Selangor ("said land"). The said land is a paddy field and is the subject matter of this suit.

[3] On 13 July 2002, the first defendant petitioned for a distribution order pursuant to s. 8 of the Small Estates (Distribution) Act 1955, citing the terrace house and said land as properties forming part of the estate of the deceased. The first defendant stated himself as the only surviving beneficiary. The plaintiff was not mentioned.

[4] The proceedings in respect of the distribution of the estate was conducted on 28 March 2002 before the third defendant, who was an officer of the fourth defendant. The first defendant had two other persons present with him at the material time as his witnesses. They were the sixth and seventh defendants. At the conclusion of the proceedings, the third defendant made an order distributing the immovable properties including the said land to the first defendant.

[5] The first defendant subsequently petitioned for another distribution order in respect of the deceased's EPF contribution amounting to RM3,617.92. The order was given on 22 August 2002.

[6] The first defendant then caused his name to be registered as the proprietor of the said land on 24 April 2002 *vide* presentation number 431/2002, in accordance with the distribution order of 28 March 2002.

[7] It was not until many years had passed that the first defendant decided to dispose of the said land. Sometime in early 2018, he offered to sell the said land to the second defendant. The second defendant was a neighbour, though not immediate, who stayed in the same vicinity in Tanjung Karang. The purchase price agreed upon was RM300,000. The parties gave effect to the intention by executing a sale and purchase agreement dated 4 June 2018. A memorandum of transfer in Form 14A was then executed on 1 August 2018. The transfer to the second defendant was registered on 19 September 2018 *vide* presentation number 1659/2018.

[8] Sometime in June 2018 after the SPA was entered into, but before the execution of Form 14A, the second defendant applied for financing facilities known as Hartani-I facility from the fifth defendant for an amount not exceeding RM100,000. By a letter dated 1 August 2018, the fifth defendant informed the second defendant that his application had been approved. The letter stated that the purpose of the facilities was to part finance the purchase of the said land. As security for financing, the said land was to be charged to the fifth defendant.

[9] Soon after the sale and transfer of the said land, the plaintiff came to know of it through the villagers. Unsurprisingly, she was shocked. The news was confirmed when she went to the land office with her son to enquire on 12 November 2018. She then sought legal advice from her present solicitors. She was informed that the distribution order in respect of the said land was issued based on false information provided by the first defendant which excluded her as the beneficiary.

Plaintiff's Case Against All The Defendants

[10] Premised on the facts as aforementioned, the plaintiff has pleaded various causes of action against the first to the fifth defendants. I have summarised the causes of action from the lengthy amended statement of claim filed by the plaintiff.

[11] The plaintiff alleged fraud on the part of the first defendant in obtaining the distribution order in disregard of her entitlement as a beneficiary. The registration of the first defendant as the proprietor of the said land was consequent to a fraudulently obtained distribution order. His title is therefore defeasible by virtue of the fraud.

[12] The first defendant's title being defeasible, he could not have passed a good title to the second defendant. The second defendant's defence that he bought the land in good faith and for valuable consideration is untenable as he bought the said land at an undervalued price of RM300,000. The land is instead worth RM600,000 at the material time. The said land was therefore transacted way below the market value. In addition, the second defendant was at all times aware of the plaintiff's existence and presence on the land as they were neighbours. He was also aware that she had been working on the said land all these while prior to the sale by the first defendant. She alleged that the second defendant's purchase of the land lacked *bona fides* on his part.

[13] As for the third and fourth defendants, the plaintiff alleged that they failed to act pursuant to s. 9 of the Small Estates (Distribution) Act 1955 in not serving the notice of petition on the plaintiff. Their failure had caused the plaintiff to be deprived of her share in the said land and the EPF monies by the issuance of the distribution orders solely in favour of the first defendant. At the trial, this allegation was abandoned.

[14] The fifth defendant was impleaded following an application to intervene granted by this court on 18 March 2021. The application was initiated to protect its interest as the said land was charged as security for the financing granted to the second defendant. Subsequent to allowing the fifth defendant to intervene, the plaintiff amended its statement of claim to plead a cause of action in negligence against the fifth defendant in approving and disbursing the loan to the second defendant without due compliance with the conditions stipulated in the financing agreement. The fifth defendant having notice that the purchase price of the said land was RM300,000 and below the market value, it should have been put on notice to undertake the necessary inquiries into the purchase by the second defendant.

[15] Before the trial commenced, the plaintiff withdrew the suit against the sixth and seventh defendants. The suit against them was then struck out.

[16] Consequent upon the pleaded facts, the plaintiff seeks various reliefs which she had set out in the statement of claim. The detailed reliefs will be discussed in the later part of this judgment. Essentially, she seeks to set aside the distribution orders of 28 March 2002 and 22 August 2002, the registration of the second defendant as the registered proprietor of the said land and the registration of the charge in the name of the fifth defendant. She also seeks consequential orders that the said lands and EPF monies amounting to RM3,617.92 be returned to the estate of the deceased and for the third and fourth defendants to re hear the petition for a distribution order.

The Defence Of The Defendants

[17] I shall briefly state the position taken by the defendants. The first defendant did not defend the suit against him. He was not present at the trial although served with writ and the statement of claim. The second defendant's

defence was that the sale and purchase transaction he entered into with the first defendant was in good faith and for valuable consideration. His title to the said land was therefore indefeasible. The third and fourth defendants took the position that they had no knowledge of the plaintiff's existence and were not complicit in the proceedings for a distribution order. The fifth defendant's defence was that all necessary procedures in approving the financing facilities was complied with and the subsequent creation of the charge was in order. Its interest as a registered chargee is indefeasible.

Issues To Be tried

[18] The competing interests and the contention of the parties give rise to the following broad factual and legal issues to be determined by this court:

(i) whether the distribution orders dated 28 March 2002 and 22 August 2002 were validly issued, and its effect on the title of the first defendant to the said land;

(ii) whether the second defendant's title to the said land is indefeasible in that he was a subsequent purchaser in good faith and for valuable consideration;

(iii) whether the fifth defendant was negligent in approving the loan transaction which led to the creation of the charge, and whether its interest created by the registered charge is indefeasible; and

(iv) the appropriate remedies consequent upon court's determination of the issues set out above.

The Trial And The Witnesses

[19] The trial spanned a period of three days in all. The plaintiff and defendants called the following witnesses:

(i) Baharudin bin Mohd Hanipah (valuer)	-	PW1
(ii) Hutayakumar a/l Planniadi (plaintiff's son)	-	PW2
(iii) Planniadi a/l Rajalingam (plaintiff's husband)	-	PW3
(iv) Dhanaletchumy a/p Subramaniam (plaintiff)	-	PW4
(v) Gunapaandian a/l Ponnusamy (second defendant)	-	DW1
(vi) Karam Singh a/l Indar Singh (solicitor who handled the sale and purchase transaction for the second defendant)	-	DW2
(vii) Zulkifli bin Ab Ghani (bank officer of fifth defendant)	-	DW3

Analysis And Decision Of This Court

Whether The Distribution Orders Dated 28 March 2002 And 22 August 2002 Were Validly Issued

[20] The validity of the distribution orders was challenged on the ground that it was fraudulently petitioned for by the first defendant, on the basis he was the sole beneficiary. The plaintiff was not present at the proceedings before the third defendant.

[21] In these proceedings, the allegation of fraud on the part of the first defendant was not defended by him as he was not present. The third and fourth defendants also elected not to adduce any evidence.

[22] I have perused the notes of proceedings in respect of the distribution order recorded on 28 March 2002 and 22 August 2002. They have been duly certified by the Land Administrator of the Kuala Selangor Land Office, and being a public document is admissible as to its contents. The notes of proceedings on 28 March 2002 record that the first defendant informed the Land Administrator as follows:

> Si mati Subramaniam a/l Pavadai
>
> Bapa. Dia mati 12-6-2001.
>
> Ibu telah mati dahulu
>
> Isteri Mariammah, mati 1975.
>
> Anak - ada saya seorang
>
> Shj. Lain anak tiada.
>
> Wasiat tiada. Hutang tiada.

[23] The notes on 22 August 2002 showed the first defendant to have given the same material information to the Land Administrator. It stated:

> Saya anak tunggal.
>
> Saya pohon harta yg.
>
> Tertinggal bagi pada
>
> Saya.

[24] Contrary to the statement by the first defendant, the documentary evidence presented at the trial showed the plaintiff to be indisputably a beneficiary to the estate of Subramaniam a/l Pavadai, the deceased. The plaintiff stated that she was not present at the proceedings before the third defendant as she was not informed and had no knowledge of such proceedings. I accept her evidence to be true, particularly in the absence of any evidence from either the first or third defendant.

[25] The plaintiff contends that the conduct of the first defendant tantamount to fraud. It is now clear that the standard of proof for fraud in civil cases is on the balance of probabilities. (See: *Sinnaiyah & Sons Sdn Bhd v. Damai Setia Sdn Bhd* [2015] 7 CLJ 584; [2015] 5 MLJ 1). I find the standard to have been met in the light of the circumstances in which the distribution order was issued.

[26] As the distribution orders of 28 March 2002 and 22 August 2002 were fraudulently obtained in disregard of the plaintiff's rights, they must be held to be null and void and of no effect.

[27] Subsequent to the issuance of the distribution orders, the first defendant obtained registration of the said land in his name. Having established that fraud was committed by him in the application for the distribution orders, the question to be considered next is whether his title is indefeasible by virtue of the provisions of s. 340(2)(a).

[28] The determination of this issue calls for examination of the provisions of s. 340 of the National Land Code. The provision reads:

340 Registration to confer indefeasible title or interest, except in certain circumstances

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible:

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy; or

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2):

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted there out shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent – (a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or (b) the determination of any title or interest by operation of law.

(emphasis added)

[29] In *Sia Hiong Tee & Ors v. Chong Su Kong & Ors* [2015] 8 CLJ 1173; [2015] 4 MLJ 188, the Federal Court expounded on the concept of indefeasibility in s. 340 of the NLC as follows:

> [26] For better understanding of the concept of indefeasibility, the analytical framework of s. 340 of the NLC is discussed in brief. Section 340 introduced the concept of indefeasibility of title following the Torrens system. Section 340(1) sets out the general principle that the proprietor in whose favour registration has been effected will obtain an indefeasible title to or interest in the land. In other words upon registration of a title, it confers an indefeasible title to the owner whose name is registered. It is a system that operates on the principle of 'title by registration'. By indefeasibility, it means, 'the immunity from attack by a diverse claim to the land or interest in respect of which he is registered, which a registered proprietor enjoys' (see *Frazer v. Walker* [1967] 1 All ER 649).
>
> [27] The indefeasibility of title or interest so acquired under s. 340(1), however, is liable to be set aside under s. 340(2) where it has been obtained by, *inter alia*, fraud or forgery. Thus, based on the concept of conclusive proof of registration, anyone, including those who had successfully registered the land by unlawful means, their title could not also be defeated unless if it is shown that the transfer was tainted with fraud or forgery as provided in s. 340(2). In the case of fraud, s. 340(2)(a) provides for the title or interest obtained to be defeasible where the proprietor or his agent is a party or privy to the fraud. In the case of forgery, s. 340(2)(b) provides for the title or interest so acquired by the proprietor or transferee immediately to the forgery to be defeasible and liable to be set aside. Thus, the title is subject to challenge and can be defeated although the proprietor or transferee acted in good faith in acquiring the title or interest. The section differentiates between title obtained through forgery or fraud. In the case of forgery, there is no requirement that the proprietor or transferee to be a party to the forgery but he must be a party or privy in the case of fraud.

[30] Very recently, in *See Leong Chye & Anor v. United Overseas Bank (Malaysia) Bhd & Another Appeal* [2021] 6 CLJ 650; [2021] 5 MLJ 759, the Federal Court held that if the registration was obtained through any one of the vitiating factors listed under sub-s. 340(2) of the NLC – fraud, misrepresentation, forgery, insufficient or void instrument, the title is liable to be set aside by the rightful owner of the land. (See also: *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269*; Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; *He-Con Sdn Bhd v. Bulyah Ishak & Anor And Another Appeal* [2020] 7 CLJ 271).

[31] As the first defendant was himself a party to the fraud by which he obtained registration of the said land, I find that his title is defeasible on account of the fraud.

Whether The Second Defendant's Title To The Said Land Is Indefeasible In That He Was A Bona Fide Purchaser For Value

[32] Pursuant to the SPA, the first defendant executed the memorandum of transfer in Form 14A to transfer the said land to the second defendant, which was then registered in the latter's name. The second defendant contends that notwithstanding the defeasibility of the first defendant's title, as a *bona fide* purchaser for value, he obtained an indefeasible title.

[33] The contention of the second defendant is premised on the proviso to para. (3) of s. 340. Section 340(3) provides for situations where a defeasible title can be set aside, subject to the exception in the proviso where the title is acquired by any subsequent purchaser in good faith and for valuable consideration. The second defendant contends that having met the test in the proviso, he is able to maintain a good title to the said land.

[34] The burden of proving that there was valuable consideration and good faith in the conveyance of the property lies on the subsequent purchaser (see *Teoh Kim Heng v. Tan Ong Ban* [2014] 8 CLJ 316; [2014] 6 MLJ 289).

[35] To establish that he came within the terms of the proviso, the second defendant adduced the following evidence. The second defendant testified that he was shown a copy of the title to the said land by the first defendant, evidencing the latter as the registered proprietor. Upon being satisfied that the first defendant had title to the said land, he agreed to the sale and purchase. He paid an initial deposit of RM30,000 towards the purchase price. The balance of RM270,000 was paid subsequently which comprised of the RM100,000 loan from the fifth defendant.

[36] He also stated that he had no knowledge of the plaintiff's rights on the land until she came to see him sometime end of 2018. He then told her that she ought to settle the matter with the first defendant.

[37] As for the market value of the land, he stated in cross-examination that upon enquiries made by him, he was informed that the value was in the region of RM280,000 to RM300,000.

[38] To refute this contention, the plaintiff called as her first witness, Encik Baharuddin bin Mohd Hanipah, a valuer from Transasia Property Consultancy Sdn Bhd. His valuation report on the said land was adduced in evidence. His valuation of the said land as of 31 August 2018 was RM600,000. He utilised the comparison method in arriving at the said value by considering the sale of five pieces of land in Sekinchan and Tanjung Karang transacted between 2014 and 2017 and making the necessary adjustments for dissimilar features. He disagreed with the suggestion of the second defendant's counsel that the land was worth only RM300,000.

[39] He stood firm in his evidence when challenged in cross-examination by the second defendant's counsel. There was no valuation report adduced by the second defendant to rebut his valuation of the said land. The court is guided by his expert opinion as the court is no expert in determining the value of the land. (See *Jitender Singh Pagar Singh & Ors v. Pentadbir Tanah Wilayah Persekutuan & Another Appeal* [2012] 2 CLJ 165; [2012] 1 MLJ 56).

[40] I also note that in granting the loan facilities to the second defendant, the fifth defendant had stipulated a condition precedent that a fresh valuation report by the bank's panel of valuer must value the land at an open market value of RM650,000. The fact that the loan was subsequently disbursed meant that this condition precedent was met. The market value of RM650,000 accepted by the bank was therefore not too different from the estimation of PW1.

[41] The transacted price of RM300,000 of the said land raises more than a reasonable suspicion that it was not bought at the market price. The operative word in the proviso is valuable consideration, and not merely consideration. This must necessarily imply that not only must be there be consideration, the consideration must be adequate and in keeping with the property's value.

[42] At the trial the second defendant was asked by the court as to how the parties arrived at the purchase price of RM300,000. The second defendant said that the price was suggested by him. It was not offered by the first defendant. However, in his evidence in chief by way of his witness statement, he stated that it was the first defendant who offered to sell the said land at RM300,000. He appeared to have resiled from his evidence in chief.

[43] He agreed when suggested in cross that he bought the said land at a cheap price. His evidence established that he was aware that the purchase price of the said land was less than the market value. He was capitalising on the first defendant's keenness to sell the land. There is documentary evidence that several payments of more than RM10,000 were made to the second defendant in early 2016, even before the execution of the SPA.

[44] In the case of *Yap Ham Seow v. Fatimawati Ismail & Ors And Another Appeal* [2013] 9 CLJ 577; [2014] 1 MLJ 645, the Court of Appeal found:

> [63] The question now is whether the fourth defendant has succeeded in proving that he is indeed a *bona fide* purchaser for valuable consideration who had obtained an indefeasible title. To this end, the fourth defendant had led evidence to show he had entered into a valid sale and purchase agreement with the third defendant and bought the land at the purchase price of RM1,150,000. Prior to the sale of the land the fourth defendant conducted a land search wherein the register reflected the third defendant as the registered owner. The fourth defendant had also led evidence to show that upon his instructions a valuation report was prepared by Messrs Khong & Jaafar on 17 July 2003 (exh. D-65) and the market value of the

land was assessed at RM1,200,000. The fourth defendant inspected the land prior to purchase and he had testified in court that the reason for the purchase of the land was for investment purpose.

[45] Had the second defendant obtained a valuation report to support the purchase price, I might have been persuaded that he purchased the said land for valuable consideration. The purchase price of the said land was well below the market value. In fact, he bought at a price which was half of its market value. I therefore find that the test of valuable consideration was not satisfied.

[46] To my mind, the amount paid for the said land raises the inference of lack of good faith on the part of the second defendant. In considering good faith, I have also taken into consideration other evidence impacting this issue.

[47] The second defendant admitted to having known the first defendant for a long time. They were neighbours in the vicinity. He stated that he knew the plaintiff was the sister of the first defendant, and their father as well, and that they were paddy planters. He was aware that the plaintiff worked on the said land, whereas the first defendant worked elsewhere in the city. He was also aware that on the said land was a workshop. This workshop belonged to the plaintiff's son, PW2.

[48] However, when questioned as to whether he made the necessary enquiries pertaining to the said land, he insisted that he had no duty to do so. This was his evidence in cross:

> Saya tidak perlu tanya plaintiff dan suaminya, saya tengok geran sahaja. Saya lihat geran tersebut saya nampak geran itu siapa punya justeru itu saya hanya berurusan dengan tuan punya tanah, bukan orang lain.
>
> Ada bengkel besi atas tanah sawah.
>
> Saya tidak tanya PW2 mengenai bengkel. Bukan tanggungjawab saya untuk tanya PW2.
>
> Setuju ada jumpa di perayaan, kuil dan sebagainya.
>
> Saya beritahu D1 apa-apa masalah keluarga dengan kakak, you selesaikan dulu.

[49] His evidence appears to me incredible. It was the second defendant's own evidence that he had been on his land since 2006. The plaintiff on the other hand, had been there since 1989. Although their plots of land were not adjacent, they were aware of the other's presence.

His evidence was clearly an admission that the plaintiff's family was known to him:

> Saya kenal Planniadi.
>
> Saya tahu bahawa Planniadi dan isterinya plaintiff bekerja di tanah sawah tersebut.

[50] A prudent purchaser would have been put to the necessary inquiries upon knowing the presence of plaintiff on the land, more so as she worked on the land. At the very least, he ought to have enquired from the plaintiff who was in physical possession of the said land. I find it inexplicable that he merely relied on the particulars in the copy of the title shown to him by the first defendant. He failed to take the necessary precautions. The carelessness on his part negated the good faith he claimed to have.

[51] The plaintiff is still presently on the land, although she has since stopped planting paddy upon knowing the land had been purchased by the second defendant in late 2018. The workshop is still on the land. The second defendant admitted that he had not taken any action to obtain vacant possession, neither did he request that the plaintiff vacate the land.

[52] Upon considering the evidence surrounding the purchase of the land, and the conduct of the second defendant, I am compelled to find that the second defendant was lacking in good faith. In the circumstances, he cannot benefit from the protection in the proviso to s. 340(3). His title is defeasible notwithstanding the fact that he is the registered proprietor of the said land.

Whether The Fifth Defendant Was Negligent In Approving The Loan Transaction Which Led To The Creation Of The Charge, And Whether The Interest Created By The Charge Is Indefeasible

[53] The second defendant applied for loan facilities referred to as Pembiayaan Hartani-I of RM100,000 to finance the purchase of the said land. The said land was charged to the fifth defendant as security for the loan.

[54] DW5, the then branch manager of the Sekinchan Agro Bank, testified the second defendant applied for the loan facilities on 22 June 2018. Upon following the procedure and process involved in a loan application, the loan was approved on 27 July 2018. The second defendant was then issued a letter of offer on 1 August 2018. Subsequent to the approval, the solicitors for both the second and fifth defendants communicated on the execution of the necessary documentation to give effect to the loan. The charge was created and registered on 19 September 2018 *vide* presentation no 1660/2018.

[55] Having considered the evidence of DW5, I do not find anything irregular in the loan approval. There was no credible evidence adduced by the plaintiff on the issue of negligence apart from questions asked in cross-examination of DW5, whose evidence was unshaken. In any event, I fail to see the nexus between the loan approval and the plaintiff being deprived of the said land as a beneficiary. For a claim in negligence to succeed, the plaintiff must first establish that a duty of care is owed by the fifth defendant to the plaintiff. On the facts of this case, I do not find any relationship of proximity between the plaintiff and the fifth defendant for a duty of care to arise. In the circumstances, the plaintiff's case of negligence against the fifth defendant fails.

[56] The question to answer next is the interest of the fifth defendant as a chargee bank, and whether the fifth defendant is entitled to come within the proviso to s. 340(3). The proviso makes reference to 'interest', apart from 'title', and it refers to a statutory interest in land given to a charge. It is now settled law that a chargee is capable of acquiring an indefeasible interest, and that 'purchaser' in the proviso extends to a chargee whose interest is registered. (See *Tan Ying Hong v. Tan Sian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1; *CIMB Bank Bhd v. AmBank (M) Bhd & Ors* [2017] 9 CLJ 145; [2017] 5 MLJ 142).

[57] Since the fifth defendant is the chargee, it is the holder of a subsequent interest in the land. There is nothing to suggest lack of good faith on its part. I therefore find that the fifth defendant can avail itself of the protection afforded by the proviso to s. 340(3).

[58] For the sake of completeness, although the third and fourth defendants were cited and negligence pleaded against them, counsel informed the court during the trial that the plaintiff does not intend to pursue this cause of action. Instead, the third and fourth defendants are to remain as defendants for the purpose of giving effect to the judgment and to comply with the orders to be given by this court.

Remedies Available To The Plaintiff

[59] Having determined the liability of the first and second defendants, what remains to be dealt with is the appropriate relief/remedies to be granted affecting the defendants.

[60] The plaintiff's statement of claim at para. 102 has set out copious remedies which requires me to deal with each remedy stated. As there is some overlapping, I have taken the liberty of dealing with some of them collectively.

Prayers (a), (b), (c) And (d)

[61] These reliefs pertain to declarations that the distribution orders dated 28 March 2002 and 22 August 2002 were fraudulently obtained for the following reasons:

(i) the application for the orders were not informed to the plaintiff;

(ii) the application was premised on false information given by the first defendant that he was the only beneficiary; and

(iii) the orders were made without the plaintiff's consent and knowledge as a beneficiary.

[62] The plaintiff thereupon seeks an order that the registration of the said land in the name of the first defendant be set aside. The plaintiff withdraws the order in respect of the terrace house as the house has now been transferred

to a third party. In addition, the plaintiff stated in evidence that it was her late father's wish to give the terrace house to the first defendant. I allow all the prayers sought.

Prayer (e)

[63] Prayer (e) is a declaration that the fifth defendant was negligent in approving and disbursing the loan to the second defendant. This prayer is not allowed as the cause of action in negligence against the fifth defendant has not been proven.

Prayer (f)

[64] Prayer (f) is an order that the first and second defendant discharge and redeem the charge on the said land from the fifth defendant. This prayer warrants some discussion.

[65] Having found that the fifth defendant's interest is indefeasible, the natural consequence is that the title, upon it being reverted to the deceased's is subject to the charge. However, this would mean a hollow victory for the plaintiff who has now successfully challenged the title of the first and second defendants. The plaintiff's quandary was appreciated in the case of *Kasai Reiko v. Annie Lor Lee Fong & Ors; Public Bank Bhd (Intervener)* [2014] 3 CLJ 869; [2014] 7 MLJ 652. The plaintiff there was found to have been defrauded of her property which was subsequently charged to the bank. However, the court found the interest of the bank was indefeasible.

[66] His Lordship Justice Lee Swee Seng (JC as he then was) gave his views as follows:

> Whether the plaintiff can still be registered owner of the apartment G15 subject to the charge in favour of the bank
>
> [64] At first blush as the interest of the bank is indefeasible, it would appear that nothing can be done which would result in compromising the charge of the bank. However the first defendants cannot be allowed to profit from their wrongs in that as the charge is indefeasible, they might still deprive the plaintiff of her rightful title by one day fully discharging the charge and obtain yet an indefeasible title to the apartment. That would be to add insult to injury. What the bank has acquired is only an interest over the apartment and not the title to the apartment G15.
>
> [65] A more appropriate order to explore would be to order the first defendants to transfer apartment G15 to the plaintiff but subject to the charge to the bank. Alternatively the plaintiff can be given the option to redeem the apartment and the amount so incurred shall be deemed as judgment entered by the plaintiff against the first defendants.

A [66] This anomaly was appreciated by the High Court in *Owe Then Kooi v. Au Thiam Seng & Anor Development & Commercial Bank Bhd v. Au Thin Chai & Ors (Owe Then Kooi, Intervener)* [1990] 1 MLJ 234 at 239, where His Lordship Abdul Malek J (as he then was) wrestled with the issue as follows:

> B I am inclined to hold that the proviso to sub-s. (3) eliminates the necessity of the purchaser in good faith and for valuable consideration applying to set aside the defeasibility and it follows that from the facts of the present case, the title to the property had reverted to the plaintiff but the interest remains vested in the second defendant. This would mean that I should have granted C order in terms for the second defendant's application as plaintiff in the originating summons to foreclose the property. I may have been in error here but, to my mind, *it would be disastrous to find a subsequent innocent chargee to have a better right than the defrauded registered proprietor with the title who was not party or privy to any of the situations that made the title or interest defeasible* in the light of *Quah* D *Hong Lian Neo* [1936] MLJ 203 's case. As between them, even if the charge is held to be valid, the position would be that the chargee acquired only an interest in and not a title to the land and the registered proprietor of the charged land can in fact further sell the land to a third party who will take it subject to the registered lease or charge. (emphasis added)

E

[67] His Lordship then made the following order:

> [74] With respect to the charged unit G15, the said unit shall be transferred back by the first defendants to the plaintiff within 14 days subject to the charge and the first defendants are hereby F ordered to pay to the bank the redemption sum for the unit to be so discharged. The redemption sum is currently at RM211,007.24 as at 31 December 2012 with accruing interest. The plaintiff shall be at liberty to pay this or such other redemption sum as may be accrued to get a full discharge of charge and such sum paid shall be deemed as judgment entered and enforceable against the first G defendants.

[68] I find guidance in the order made by His Lordship, to do justice to the plaintiff. I therefore order that the second defendant be directed to redeem the amount outstanding (to be notified by the fifth defendant) for which the said land charged, within 30 days of service of the sealed order, failing which H the plaintiff shall be allowed to redeem, and such sum if paid by the plaintiff shall be deemed a judgment sum entered and enforceable against the second defendant. This order however, cannot be ordered against the first defendant as prayed for, since he was not the borrower.

Prayer (g)

I

[69] By prayer (g) seeks to declare the registration of the charge *vide* presentation no 1660/2018 to be invalid. Having found the fifth defendant to come under the proviso to s. 340(3), this prayer is disallowed.

Prayers (h) And (i)

[70] These reliefs pertain to the sixth and seventh defendants whose suit against them had been withdrawn. Consequently, the prayers fall.

Prayers (j), (k), (l), (m) And (n)

[71] Essentially these prayers are to seek an order for the fourth defendant to cancel the distribution orders, rehear the petition and re-register the said land in the name of the deceased. The first defendant is also ordered to return the EPF monies to the estate of the deceased. These prayers are allowed save for (m) which pertains to the terrace house.

Prayers (o) And (s)

[72] By these prayers, the plaintiff seeks a declaration that the first defendant had committed the tort of conversion in respect of the deceased's movable and immovable property, and damages in respect thereof. This prayer is not allowed as the focus of the trial was on the void distribution order and the subsequent transactions rather than the tort of conversion. In any event, the plaintiff's evidence made no mention of the tort of conversion.

Prayers (p) And (q)

[73] The declarations sought here are to declare the transfer of the said land from first defendant to the second defendant *vide* presentation no 1659/2018 null and void, and to cancel the registration of the second defendant as the owner of the land. Following my decision aforementioned, these prayers are allowed.

Relief (r)

[74] The plaintiff seeks an order that the title to the said land be surrendered by the second defendant to the plaintiff or her solicitors for the purpose of endorsing on the title, the registration of the said land in the name of Subramaniam a/l Pavadai, the deceased. This prayer is allowed, but subject to compliance of prayer (f).

Reliefs (t) And (u)

[75] The plaintiff prays to be awarded damages for loss of income for two harvesting seasons estimated to total RM14,000 to RM18,000, and continuing. This claim is sought against the first, second and fifth defendants. I do not find the claim against the first and fifth defendants justified.

[76] In her evidence, the plaintiff said after end of 2018, she did not do any planting and consequently lost her income of RM7,000 to RM9,000 per harvesting season. She furnished no documentary evidence in support. The only documentary evidence was a BERNAS card issued in the name of her

husband (PW3) to obtain subsidy for rice. In the circumstances, I do not find her claim for damages proven by any convincing evidence. The prayers are therefore disallowed.

Prayer (v)

[77] The plaintiff seeks to be awarded general, aggravated and exemplary damages against the first, second and fifth defendants. Apart from the alleged loss of income, there was no evidence led to justify an award of aggravated and exemplary damages. The plaintiff's testimony made no reference to any evidence in support of the claim for this head of damages. The prayer is disallowed.

Prayer (w)

[78] This prayer pertains to the terrace house. As the claim in respect of this part of the estate has been abandoned, there is no reason to allow this prayer.

Conclusion

[79] In conclusion, the claim of the plaintiff succeeds against the first and second defendants, limited to the prayers as aforementioned. The claim against the third defendant succeeds to the extent that she is allowed the necessary orders which are consequential to the plaintiff succeeding in the substantive claim against the first and second defendants. The claim against the fifth defendant fails.

[80] In view of my decision, I order the first and second defendants to pay costs of RM10,000 each to the plaintiff. In turn, the plaintiff is to pay costs of RM10,000 to the fifth defendant. No costs is ordered against the third and fourth defendants.